92-1836

NO.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

JAMES M. PREE,

Petitioner,

vs.

THE BRUNSWICK CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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48 pp

QUESTIONS PRESENTED FOR REVIEW

Under *Erie* and the Tenth Amendment, Was the Eighth Circuit Obligated to Follow *Dicta* In a Missouri Supreme Court Decision Rejecting the "Consumer Expectation" Test for Strict Products Liability?

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OPINION BELOW

The opinion below is reported as Pree v. Brunswick Corp., 983 F.2d 863 (8th Cir. 1993).

GROUNDS FOR JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment against Petitioner on January 7, 1993, and denied Petitioner's Petition for Rehearing on February 12, 1993.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Amendment X to the United States Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

James M. Pree was severely and permanently injured when his foot was struck by a propeller, which was part of an out-drive manufactured by appellee/respondent. He brought a single count product liability action in the state courts of Missouri, under strict liability in tort for enhancement of injury, on the basis that defendant's lower unit was defectively designed due to the absence of a propeller guard. Defendant Brunswick removed the case to federal court on the basis of diversity of citizenship. After defendant was permitted, over objection, to introduce testimony concerning drinking by appellant/petitioner during the 36 hour period before his leg was struck by the propeller, and to argue that such drinking was the "sole cause" of the petitioner's injury, the jury returned a defendant's verdict.

The Eighth Circuit agreed with petitioner that such evidence was irrelevant, inadmissible and prejudicial. However, in refusing petitioner a new trial, the Eighth Circuit held that defendant's motion for directed verdict should have been granted because petitioner did not make a submissible case for the jury under the "consumer expectation test."

REASONS WHY THE WRIT SHOULD ISSUE

Under *Erie* and the Tenth Amendment, the Eighth Circuit Was Obligated to Follow Dicta in the Missouri Supreme Court Decision of *Nesselrode v. Executive Beechcraft, Inc.*, Rejecting the "Consumer Expectation" Test for Strict Products Liability

Petitioner fell off of a boat utilizing defendant's motors and suffered disabling leg injuries from being struck by defendant's propellers. He sued Brunswick in state court under § 402A strict liability in tort on the theory that the motors were unreasonably dangerous for lack of propeller guards. Defendant removed to federal court under diversity jurisdiction. The United States Court of Appeals for the Eighth Circuit found that Missouri follows the "consumer expectation test" in determining whether a product is unreasonably dangerous, and that, as a matter of law, motors with unguarded propellers are

not "unreasonably dangerous" under that test. Pree v. Brunswick, 983 F.2d 863, 867-868 (8th Cir. 1993); Appendix A xvi-xix.

In Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371, 376-78 (Mo. 1986) (En Banc), the case on which the trial judge relied for his ruling that Missouri did not follow the test, the Missouri Supreme Court discussed the pros and cons of the "consumer expectation test" at great length. Id. at 376-78. It noted that the "consumer expectation test has met with little enthusiasm among legal scholars," and that one criticism which has "been levelled" at the test is that "it fails when applied to open and obvious defects." Id. at 376, 376 n.6. Further, "dissatisfaction with the . . . consumer expectation formulation . . . has . . . taken hold in a number of jurisdictions," citing, "e.g.," California, New York, Oregon, Pennsylvania, New Jersey, and Texas. Id. at 376-77.

The Missouri Supreme Court went on to state: "[W]e have not yet formally incorporated, in any meaningful way, the . . . consumer expectation test into the lexicon of our products liability law." Id. at 377. "The . . . consumer contemplation test is a virtual stranger to Missouri's law of strict tort liability. . . . [W]e have been able to find only a handful of reported cases decided by our intermediate appellate courts which mention, but do not necessarily apply in any substantive fashion, the consumer contemplation test." Id. at 377 n.10.

The only post-Nesselrode Missouri opinion to mention the "consumer expectation test" recognized the above as a determination by the Missouri Supreme Court not to adopt such test: "In Nesselrode v. Executive Beechcraft, Inc., . . . the Supreme Court rejected the consumer expectation test . . . ." Richardson v. Holland, 741 S.W.2d 751, 753 (Mo. App. 1987).

In the trial of the instant lawsuit, the trial judge overruled Brunswick's motion for directed verdict, which was premised on the "consumer expectation test," ruling that "the State of Missouri has specifically disavowed" the "consumer expectations" test. Transcript V-6; Appendix C i-ii. The trial judge also rejected a proposed instruction on that test, specifically citing Nesselrode: "The Missouri Supreme Court in the Nesselrode case recognized that Missouri did not and has not adopted the consumer expectations test in product liability cases." Transcript VIII-11 to 12; Appendix C iii-iv.

The Eighth Circuit has declined to accept Nesselrode's rejection of the "consumer expectation test" because it is dicta:

> [W]hile we are cognizant of the Missouri Supreme Court's expression in Nesselrode of its dissatisfaction with the consumer expectation doctrine, we are less inclined than is Cowens to interpret the court's statements in this regard as an

> explicit decision to reject this concept altogether. The court in Nesselrode noted that the consumer expectation doctrine was a "virtual stranger to Missouri law of strict tort liability," but did not expressly overrule or reject prior Missouri cases which had mentioned this concept.

Cowens v. Siemens-Elema AB, 837 F.2d 817, 822 (8th Cir. 1988) (Emphasis added.).

In Linegar v. Armour of America, Inc., 909 F.2d 1150, 1153 (8th Cir. 1990), the Eighth Circuit continued to downgrade the dicta in Nesselrode: "Courts applying Missouri law also have applied what has become known as the 'consumer expectation' test for unreasonable dangerousness[1] . . . . But see Nesselrode,

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[1] This statement was not accurate. The only Missouri case cited was Aronson's Men's Store Inc., v. Potter Elec. Signal Co., 632 S.W.2d 472 (Mo. 1982) (En Banc). In that case, Aronson complained that a burglar alarm was "defective and unreasonably dangerous" because it was easily deactivated, leading to the loss of his property. The Supreme Court rejected this claim because "[n]either the control box, nor any other part of the system, exploded, ignited or caused harm to appellant's property in any manner, much less suddenly or violently." 632

707 S.W.2d at 377 . . . ."

In the instant case, the Eighth Circuit reduced its acknowledgement of the dicta in Nesselrode to the slightest of nods: "While we are aware that the Missouri Supreme Court has not adopted what is known as the 'consumer expectation' test into their lexicon in

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(Note 1 cont.)
S.W.2d at 474. Mr. Aronson's expectations played no part in the decision.

The Nesselrode court's discussion of its earlier opinion in Aronson's makes it quite clear that it was not a basis for a prediction by the Eighth Circuit that Missouri's highest court would have applied the consumer expectation test to the instant case:

> In Aronson's Men's Store v. Potter Electrical Signal Company, Inc., . . . this Court noted that the Restatement defined defectiveness by way of consumer expectations. We stopped short, however, of reaching the issue which would have required us to define the concept, and therefore we did not hold that under Missouri law the standard of defectiveness was rooted only in the expectation of the ordinary consumer.

Nesselrode, supra at 377-78 n.10 (Emphasis added.).

deciding product liabilities actions, it has not rejected it. See Cowens v. Siemens-Elema AB, 837 F.2d 817, 822 (8th Cir. 1988) (applying Missouri law)." Pree v. Brunswick, 983 F.2d at 867; Appendix A xvi. Though Nesselrode was not even mentioned by name, the language, the loc. cit. to Cowens' discussion of Nesselrode, and the trial court's reliance on Nesselrode make it quite clear that the Eighth Circuit panel below was keenly aware of the dicta in Nesselrode rejecting the consumer expectation test, and chose not to follow it.

Had this matter arisen in the Fifth, Sixth, Seventh, Tenth, or Eleventh Circuits, it is clear that the result would have been different. In the Fifth Circuit, in Fehlhaber v. Fehlhaber, 681 F.2d 1015, 1023 (5th Cir. 1982), the court held that it was "irrelevant," in deciding state substantive law in a diversity case, whether the language of a state's highest court was "dictum . . . for,

where we are bound by state law, considered dictum is to be followed as well as a precise holding."

The Sixth Circuit has accorded dicta by a state's highest court the same respect: "Appellants urge . . . that the foregoing ruling in Moyses was but dicta and was not essential to the issues litigated in that case. It is true that the immediate effect of the court's decision in Moyses was to uphold the discretion of the trial court . . . . The extensive recapitulation in Moyses is not a chance or offhand expression of the court, but is rather a clear and unequivocal conclusion of the highest tribunal in the state. We are convinced we should abide by it." Frank v. Voris, 503 F.2d 1023, 1024-1025 (6th Cir. 1974).

The Seventh Circuit also would have followed the dicta in Nesselrode: "The pronouncements in Central Indiana, while dicta

and not essential to the disposition of the case, nevertheless indicate the highest court of the state's interpretation of the law in this area, and we sitting as another court of that state, follow that interpretation as the substantive law of Indiana." Hartzler v. Chesapeake & Ohio Ry., 433 F.2d 104, 107 (7th Cir. 1970).

In the Tenth Circuit, the dicta in Nesselrode would also be followed: "It is clear that the statement was dictum. Nevertheless, '[t]he responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it.'. . . Both the holdings and considered dicta of the State Court should be applied." Hardy Salt Co. v. Southern Pacific Transp. Co., 501 F.2d 1156, 1163 (10th Cir. 1974).

The Eleventh Circuit also abides by dicta from a state's highest court in diversity

cases. In Towne Realty, Inc. v. Safeco Ins. Co., 854 F.2d 1264, 1268-69 (11th Cir. 1988), the Court held that a dictum in "[a] recent Florida Supreme Court case . . . resolve[d] the conflict" between two insurance policies. In a footnote, the Eleventh Circuit stated: "Insofar as this passage [in the Florida Supreme Court opinion] addresses escape clauses and yet the case apparently did not involve any escape clauses, the statement is a dictum. Even so, when considering a diversity case under state law, we are bound to decide the case the way it appears the state's highest court would, and we would be violating that duty to ignore the fact that this statement was made." Id. at 1269 n.5.

Although the United States Court of Appeals for the District of Columbia Circuit does not accord binding effect to dicta from the state's highest court, it is clear that the dicta from Nesselrode would have received a

more respectful reception from that circuit than it has in the Eighth Circuit: "[c]onsidered dictum. . . . is strongly persuasive, even though we may not be bound to accept it." Gasch v. Britton, 202 F.2d 356, 360 (D.C. Cir. 1953).

Those circuits which consider themselves bound by dicta from a state's highest court find strong support in (and, in some instances, have relied on) an opinion of this Court, involving a state's construction of its own statute, which predates Erie. In Hawks v. Hamill, 288 U.S. 52, 60 (1933), this Court said:

> In controversies so purely local, little gain is to be derived from drawing nice distinctions between dicta and decisions. Disagreement with either, even though permissible, is at best a last resort, to be embraced with caution and reluctance. The stranger from afar, unacquainted with the local ways, permits himself to be guided by the best evidence available, the directions or the counsel of those who dwell upon the spot.

In the remaining circuits, it appears that only the Ninth Circuit would treat the dicta in Nesselrode as cavalierly as the Eighth Circuit has treated it: "In cases where the appellate court of the state has not spoken, well-considered dicta should not be ignored." Gee v. Tenneco, 615 F.2d 857, 861 (9th Cir. 1980).[2]

That the language in Nesselrode was "considered dicta" as opposed to mere "obiter" is not open to question. The Missouri Supreme Court's wide-ranging review of its products liability law included reinforcement of its long-held view that:

> Under our model of strict liability the concept of unreasonable danger, which is determinative of whether a product is defective in a

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[2] From a reading of its opinion in McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657, 662-67 (3d Cir. 1980), it is unclear what treatment the Third Circuit would accord the dicta in Nesselrode. Counsel for petitioner has been unable to locate any discussions in the First or Fourth Circuits as to the effect of dicta from the highest court of a state in resolving Erie questions.

> design case, is presented to the jury as an ultimate issue without further definition. . . . Accordingly, our approved jury instruction which governs in a design defect case . . . does not contain as one of its component elements a definitional paragraph which gives independent content to the concept of unreasonable danger. . . . [A]t the trial of a design defect case, the concept of unreasonable danger is treated as an ultimate issue.

Nesselrode v. Executive Beechcraft, Inc., supra at 378.

Missouri submits the elements of a cause of action in a civil case to the jury in a "verdict-directing" instruction. The verdict director on products liability submits the issue of product defect as follows: "Second, the (describe product) was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use." MAI 25.04. This is the only instruction on this element which has ever been approved by the Missouri Supreme Court, and has been the law for over 20 years. Each pattern instruction in Missouri is deemed

to be both a "complete" and "correct statement of law." Missouri Approved Jury Instructions XV (Committee Report); Id. at XXXIII (Committee Comment). "Verdict directing MAIs hypothesize . . . . the ultimate facts which support the submitted claim . . . . The theory of claim is based on the applicable law." Id. at XXXIV (Committee Comment). The instructions have never submitted a "consumer's expectations" to the jury.

In rejecting the dicta in Nesselrode, the Eighth Circuit adopted a criteria for submissibility which is more restrictive, narrow, and particularized than the element which is submitted to the jury. This is a concept which is totally foreign to Missouri law. Since the adoption of MAI, there has never been a case in Missouri where a court has measured submissibility by a standard utilizing language other than that used in MAI.

The "considered dicta" in Nesselrode which the Eighth Circuit rejected is supported by other Missouri case law.[3] In Missouri, "[d]esign defects of a simple nature have

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[3] In preference to the dicta in the Supreme Court's decision in Nesselrode, the Eighth Circuit gleaned a "consumer expectation test" from dicta in two earlier intermediate appellate opinions. Pree v. Brunswick, supra at 867; Appendix A xvii. In the first of these, Cryts v. Ford Motor Co., 571 S.W.2d 683 (Mo. App. 1978), the court of appeals affirmed a verdict for plaintiff based on a claim of a defective armrest. The court held that evidence that the armrest "was constructed of hard plastic with minimal energy-absorbing capacity; that it was lightly padded; and that its point shape was such as to concentrate the force of energy absorbed by the body" supported a jury finding "that the armrest was defective and that it was unreasonably dangerous for its anticipated use." 571 S.W.2d at 688. The court did not analyze this evidence in light of the consumer's expectations.

In the other intermediate appellate opinion relied on by the Eighth Circuit, Racer v. Utterman, 629 S.W.2d 387 (Mo. App. 1981), Racer was burned when a disposable drape caught fire during an operation. In affirming a plaintiff's verdict, the court of appeals said: "We cannot say as a matter of law that this product is not 'dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it.'" 629 S.W.2d at 394. There was no attempt at analysis.

consistently been found to be submissible on the basis of an expert opinion that an alternative design was feasible." McDowell v. Kawasaki Motors Corp., 799 S.W.2d 854,866 (Mo. App. 1990); accord, Duke v. Gulf & Western Mfg. Co., 660 S.W.2d 404, 412 (Mo. App. 1983). There are also a legion of cases in Missouri upholding the submissibility of design defect cases without requiring the plaintiff to squeeze through the "consumer expectations" hoop.[4]

Since this Court does not appear to have spoken since Erie to the effect to be given dicta from a state's highest court, Petitioner

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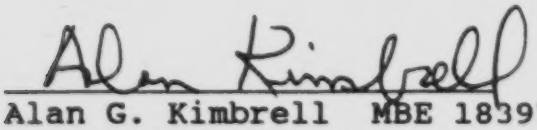
[4] E.g., Blevins v. Cushman Motors, 551 S.W.2d 602, 608 (Mo. 1977) (En Banc); Sanders v. Wallace, 817 S.W.2d 511, 514-15 (Mo. App. 1991); Asbridge v. General Motors Corp., 797 S.W.2d 775, 777-79 (Mo. App. 1990); McJunkins v. Windham Power Lifts, Inc., 767 S.W.2d 95, 100 (Mo. App. 1989); Klein v. General Electric Co., 714 S.W.2d 896, 900-901 (Mo. App. 1986); Commercial Distrib. Center Inc. v. St. Regis Paper Co., 689 S.W.2d 664, 669-70 (Mo. App. 1985); McClanahan v. Deere & Co., 648 S.W.2d 222, 223-24 (Mo. App. 1983).

respectfully submits that the conflict between the Eight Circuit's approach in the instant case and the rule in the majority of the other circuits should be resolved.

CONCLUSION

The writ should be granted because the Eighth Circuit, in determining the substantive law of Missouri in a diversity case, rejected considered dicta from that state's highest court, and based its determination upon dicta from earlier decisions in intermediate appellate courts.

Respectfully submitted,



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APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-3402

James M. Pree,	*	
	*	
Appellant,	*	
	*	Appeal from the United
v.	*	States District Court
	*	for the Eastern
The Brunswick Corporation,	*	District of Missouri
	*	
Appellee.	*	

Submitted: September 16, 1992

Filed: January 7, 1993

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

McMILLIAN, Circuit Judge.

James M. Pree appeals from a final judgment entered in the United States District Court[1] for

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[1] The Honorable Frederick Buckles, Magistrate Judge, United States District Court for the Eastern District of Missouri. The parties consented, pursuant to 28 U.S.C. § 636(c) to allow the magistrate judge to conduct all proceedings, including entry of judgment.

the Eastern District of Missouri, following a jury verdict in favor of appellee, The Brunswick Corporation, in a product liability action alleging that a design defect in appellee's engines caused them to be unreasonably dangerous and that this defect resulted in enhanced injuries. For reversal, Pree argues that the district court erred in (1) admitting evidence of his drinking and intoxication before the accident and (2) instructing the jury on contributory fault. For the reasons discussed below, we affirm the judgment of the district court.

BACKGROUND

James Pree was injured on July 5, 1985, when he fell from the back of a 1985 Wellcraft Scarab II pleasure boat[2] owned by Todd Beckman. Pree and several friends had been spending the July

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[2]These sort of boats are also known as "planing" pleasure crafts, because as they increase in speed they rise partly out of the water and plane on the surface. See Elliot v. Brunswick Corp., 903 F.2d 1105, 1506 n.1 (11th Cir. 1990).

4th weekend at the Lake of the Ozarks drinking and partying. On the morning of July 5th, at about 1:15 or 1:30 a.m., Beckman attempted to dock the boat which was powered by twin Mercury Marine 330 horsepower motors. It was raining, the water was "choppy" and there was some lightning. As Beckman backed the boat into the slip, he asked Pree to "get the back of the boat." Pree was standing on the swim platform on the back of the boat. As Pree reached out to grab the dock pole, the boat suddenly moved forward and he fell off the boat into the water. Pree was severely injured by the unguarded, rotating propeller blades. He suffered compound fractures, cut tendons, and permanent muscle and nerve damage.

On October 3, 1989, Pree filed suit in the Circuit Court of the City of Saint Louis, Missouri, against appellee the parent company of Mercury Marine, the designer and manufacturer of the motors, including the drive mechanism which

required a propeller, and Genmar Industries, Inc., the successor corporation to Wellcraft Marine Corporation, the boat manufacturer and seller. Pree claimed that the propeller was defective and unreasonably dangerous because it was not equipped with a propeller guard. On October 25, 1989, appellee removed the action to the United States District Court for the Eastern District of Missouri. On January 30, 1991, Pree dismissed his claim against Genmar Industries, Inc.

On September 1991, the parties tried the case and the district court, over Pree's motion in limine and objection, admitted evidence that Pree had been drinking various alcoholic beverages all day and well into the night shortly before the accident. The district court also heard expert testimony from both sides on whether the twin engines were defectively designed. In addition, the district court gave the following contributory fault instructions to the jury:

> Your verdict must be for [appellee] if you believe: First, when plaintiff James Pree was standing on the swim platform at the rear of the boat, plaintiff knew of the danger of coming in contact with the propellers and appreciated the danger. And second, plaintiff James Pree voluntarily and unreasonably exposed himself to such danger. And third, such conduct directly caused or directly contributed to cause any damage plaintiff James Pree may have sustained.

The jury returned a general verdict in favor of appellee. No post-trial motions were filed. This appeal followed.

DISCUSSION

I.

For reversal Pree argues that the district court erred in admitting evidence of his drinking and in giving the contributory fault instruction. Appellee argues that the district court correctly admitted evidence of Pree's drinking and that the contributory fault instruction was a correct statement of applicable Missouri law. In addition, appellee argues that, even assuming

Pree's arguments are correct, the judgment in its favor should nonetheless be affirmed because Pree failed, as a matter of law, to prove that the propeller without guards was defective in a way not understood by the ordinary consumer. We affirm on the basis of the latter contention.

This product liability case comes to us on diversity jurisdiction and Missouri substantive law controls. Missouri has adopted section 402A of the Restatement (Second) of Torts. Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362, 364 (Mo. 1969) (Keener); McIntyre v. Everest & Jennings, Inc., 575 F.2d 155, 157 (8th Cir.) (Missouri law), cert.denied, 439 U.S. 864, 99 S. Ct. 187 (1978). Strict tort liability applies to product liability actions arising out of the way a product was designed. Blevins v. Cushman Motors, 551 S.W.2d 602, 607 (Mo. 1977). In order to recover under the theory of strict liability in tort for a defective design, Missouri law requires that a plaintiff prove the following

elements:

> (1) [the] defendant sold the product in the course of its business;
>
> (2) the product was then in a defective condition unreasonably dangerous when put into a reasonably anticipated use;
>
> (3) the product was used in a manner reasonably anticipated;
>
> (4) [the] plaintiff was damaged as a direct result of such defective condition as existed when the product was sold.

Linegar v. Armour of Am., Inc., 909 F.2d 1150, 1152 (8th Cir. 1990) (Linegar), citing Fahy v. Dresser Indus., 740 S.W.2d 635, 637-38 (Mo. 1987) (Fahy), cert. denied, 485 U.S. 1022 (1988). Because there are no real disputes as to the other three elements, we predicate our decision on the second element: whether the twin motors were in a defective condition unreasonably dangerous because they were designed without propeller guards. Whether a product is unreasonably dangerous is the determinative

factor in a design defect case. Hylton v. John Deere Co., 802 F.2d 1011, 1015 (8th Cir. 1986), citing Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371, 378 (Mo. 1986) (Nesselrode).

For purposes of imposing liability under Missouri's law of strict liability, a product's design is deemed defective when it is shown that the way that the product has been designed renders it unreasonably dangerous. Nesselrode, 707 S.W.2d at 377. Although Missouri courts have left the meaning of "unreasonably dangerous" to the common sense of the fact finder, Linegar, 909 F.2d at 1153, a product is defectively designed if it "creates an unreasonable risk of danger to the consumer or user when put in normal use." Id., citing Nesselrode, 707 S.W.2d at 375.

II.

Pree argues that the absence of propeller guards was a design defect which caused appellee's engines to be unreasonably dangerous and that the injuries from his fall were enhanced

by the defective propellers.[3] Pree further contends that he presented evidence, which showed that the alternative and safer propeller guard design proposed by him was technically feasible and practical in terms of cost and the overall operation of the twin motors.

In contrast, appellee argues that Pree's evidence was insufficient to prove that the engines were defectively designed because the propellers met the reasonable expectations of the ordinary consumer as to safety. They further

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[3]Although Missouri courts have recognized contributory fault as an affirmative defense to actions based on strict liability, see Keener v. Dayton Elec. Mfg., 445 S.W.2d 362, 365 (Mo. 1969); Jarrell v. Fort. Worth Steel & Mfg. Co., 666 S.W.2d 828, 833 (Mo. Ct. App. 1984), we have some concern over such instruction in a strict liability action brought for enhanced injuries. However, because our decision here turns on whether appellant showed that the twin engines were defectively designed, we see no need to address this issue and instead leave it for another case. Furthermore, we conclude that evidence of intoxication is irrelevant in a strict tort liability action for enhancement of injury. Moreover, it is not a determinative factor in this action.

argue that a safer practical alternative design was not available to appellee at the time it manufactured the twin motors. Hence, appellee argues that Pree failed to establish an essential element of his cause of action and his motion for a directed verdict should have been granted. We agree.

Unless a court can affirmatively say as a matter of law that the design renders a product "unreasonably dangerous," the question is generally one for the jury. Nesselrode, 707 S.W.2d at 378. However, the question is generally presented to the jury as an ultimate issue without further definition. Id. In determining whether a plaintiff has made a submissible case, we must examine the sufficiency of the evidence in the light most favorable to the plaintiff and view all inferences in his or her favor. Coulter v. Michelin Tire Corp., 622 S.W.2d 421, 426 (Mo. App. 1981).

Pree's evidence on the issue of whether the

unguarded propellers were unreasonably dangerous when put to a reasonably anticipated use took two forms: Pree's attorney designed and tested a propeller guard and demonstrated it to the jury; Pree presented the testimony of two experts, Benjamin Kelly and Robert Swint. Benjamin Kelly's opinion on whether appellee's unguarded propellers were unreasonably dangerous was the result of observing tests done on several propeller guards. From these observations, Kelly concluded that appellee had not carried out an adequate effort toward developing a design, device or modification or a propeller guard intended to minimize personal injuries from propellers.

Robert Swint's opinion on whether the unguarded propellers were unreasonably dangerous was predicated on several tests he conducted on two types of propeller guards, one of which was designed by Pree. From these tests, Swint determined that appellee's engines as

manufactured and sold without a propeller guarding device are defective. Pree presented no other evidence that appellees' twin engines were unreasonably dangerous.

Appellee also presented expert testimony. Richard Snyder testified that he conducted a variety of tests on propeller guard devices. From these tests he found that the devices increased the zone of danger, created conditions that could cause entrapment of human limbs, increased the likelihood of blunt trauma, and created unstable handling conditions. Snyder was of the opinion that the presence of propeller guards increased the likelihood and severity of injuries.

Don Kueny testified for appellee that he had the opportunity to evaluate and test various propeller devices. Kueny further testified that in 1985, when this accident occurred, a device did not exist that would provide people protection from propellers and that such device

does not exist even at the present time.

James Getz testified that as Chairman of the National Boating Safety Advisory Council's Propeller Guard Subcommittee he compiled data and evaluated various propeller guarding devices. Getz testified that after the Propeller Guard Subcommittee conducted hearings and testing, it concluded that it could not recommend a propeller guard because they presented problems with respect to entrapment, blunt trauma and hydrodynamic issues. He testified that the United States Coast Guard had adopted the finding and recommendations of the Propeller Guard Subcommittee not to require or recommend propeller guards. 46 U.S.C. § § 4302 & 13110 (1983).

Appellee also presented the testimony of two other experts, John Snider and James V. Benedict. Both experts were of the general opinion that there could be some protection by propeller guards, but only at very low speeds and barring

entrapment. They concluded that the higher the speed of the boat the greater the adverse effect of any type of propeller guard, including the substantial risk that the guard itself would produce blunt trauma and injury to the head, chest, neck and extremities.

Additionally, although Pree forcefully argues that appellee could have employed a safer alternative design for their propellers, there was no evidence that such a design existed at the time the propellers were manufactured. Moreover, while some conflict existed in the expert testimony, experts for both sides conceded that at this stage neither industry custom nor pertinent regulations dictate the use of propeller guards. Witnesses for both parties also acknowledge that no boat manufacturer, or boating accessory manufacturer currently offers a propeller guard for planing pleasure boats for the purpose of protecting persons from propeller contact. In fact, Robert Swint, Pree's expert

estimated that it would take more research and testing before an appropriate guard could be developed and marketed. He further concluded that the propeller guard proposed by Pree and his attorney repeatedly broke after short term testing.

Experts for both sides also testified regarding the potential difficulties that propeller guards might engender and concluded that they cause boats to lose power and speed due to added drag. They further determined that some customers would likely remove the guards to save fuel and regain power. The experts also found that the guard removal would cause the boat to exceed its power rating which in turn would create additional handling difficulties.

After viewing the record in the light most favorable to Pree, we conclude that the evidence was insufficient to show that appellee's engines were unreasonably dangerous, and the district court should have declared as a matter of law,

that the engines were not defective and directed a verdict for appellee.[4]

III.

While we are aware that the Missouri Supreme Court has not adopted what is known as the "consumer expectation" test into their lexicon in deciding product liabilities actions, it has not rejected it. See Cowens v. Siemens-Elema AB, 837 F.2d 817, 822 (8th Cir. 1988) (applying Missouri law). In fact, Missouri courts have concluded that "the plaintiff has the burden of proving that the product was unreasonably dangerous to the extent beyond that which would be contemplated by the user with ordinary knowledge common to the community as to its

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[4]Although the parties have not raised this issue, "[w]e note that 'the standards for granting a directed verdict or judgment notwithstanding the verdict are the same under both federal and Missouri law.'" Sutherland v. Elpower Corp., 923 F.2d 1285 (8th Cir. 1991) (quoting SCNO Barge Lines, Inc. v. Anderson Clayton & Co., 745 F.2d 1188, 1192 n.5.(8th Cir. 1984)).

characteristics." Cryts v. Ford Motor Co., 571 S.W.2d 683, 688 (Mo. Ct. App. 1978) (citing Restatement (Second) of Torts § 402A, comment i); see Racer v. Utterman, 629 S.W.2d 387, 394 (Mo. Ct. App. 1981); Aronson's Men's Stores, Inc. v. Potter Elec. Signal Co., 632 S.W.2d 472 (Mo. 1982); Linegar, 909 F.2d at 1152 (applying Missouri law).

The consumer expectation test focuses attention on the consumer rather than the manufacturer of the twin engines. Applying the same consumer expectation test in a factually similar case, the Eleventh Circuit determined, as a matter of law, that a pleasure boat's unguarded propellers were not dangerous beyond the expectations of the ordinary consumer. Elliot v. Brunswick Corp., 903 F.2d 1505, 1507 (11th Cir. 1990) (applying Alabama law which, like Missouri, adopted Restatement (Second) of Torts 402A) (Elliott), cert. denied, 111 S. Ct. 756 (1991).

In Elliott the plaintiff was injured by a

rotating propeller after jumping from a pier at night in the water next to an engine without a propeller guard. In reversing a jury verdict for the plaintiff, the court concluded that there are "certain products whose inherent danger is patent and obvious, [and that these products] do not, as a matter of law, involve defects of a sort that a jury should resolve." Id. at 1507; see also Linegar, 909 F.2d at 1153-54. The court reasoned that some products, by their nature, place both users and bystanders in some measure of danger. "A knife or an axe may cut persons, as well as their intended targets. Fishhooks can wound; saws can maim, and revolving propellers can cause fearful damage. Yet . . . we do not hold manufacturers liable simply because the use of their products involve some risks." Elliott, 903 F.2d at 1507.

The present case is factually similar to Elliott. The claimed design defect in appellee's engines is the same as the alleged defect

involved in the Elliott case: failure to provide a propeller guard. Therefore, we hold that the evidence presented in the instant case not only supported the jury's verdict, but the evidence was sufficient for the trial court to hold, as a matter of law, that the unguarded propellers were not unreasonably dangerous beyond the expectation of the ordinary consumer, including Pree.

Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 91-3402EMSL

James M. Pree,	*	
	*	
Appellant,	*	
	*	Order Denying Petition
vs.	*	for Rehearing and
	*	Suggestion for
The Brunswick Corporation,	*	Rehearing En Banc
	*	
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

February 12, 1993

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

I certainly think it is a question that the Court needs to decide. I think it's a little premature. I think basically that's a question for the Court to decide when we come to instructing the jury and submitting the case, and I prefer putting off arguing that until that point.

As far as the motion for a directed verdict which, of course, as the Court knows we just saw it, we're also familiar with the Elliott case. I'd just like to point out one thing with regard to that. That case relied upon Alabama's consumer expectations law. As the Court knows --

THE COURT: Which the State of Missouri has specifically disavowed --

MR. KIMBRELL: That's right.

THE COURT: I'm fully aware of that.

MR. KIMBRELL: Nesselrode and --

THE COURT: All right.

MR. KIMBRELL: -- so on and so forth. That's all I was going to say, Judge.

THE COURT: Okay. All right. I agree with Mr. Kimbrell there. I think probably the issue of punitive damages is premature at this point. I think there is some evidence which might at this point, the Plaintiff could argue, could raise the possibility that punitive damages would be appropriate in this case, at least have been

reasons -- and it's an incorrect statement as the law -- and I don't think that the Court corrects that -- any per diem argument by the giving and reading of instruction #14. So we would -- first of all, we intend to object to the argument when it's made but, I mean, also I think that the giving and reading of instruction 14 is improper for those reasons.

Judge, I think that concludes all the objections that we have to the instructions, and thank you.

THE COURT: All right. Mr. Kimbrell, do you want to make any response to the arguments made by Mr. -- to the objections made by Mr. Mueller to the instructions that the Court's going to give, and any comment on the instructions offered by the Defendant which are going to be refused?

MR. Kimbrell: Very briefly, your Honor. The proposed instruction A tendered by the Defendant submits the consumer expectations

test. The Missouri Supreme Court has stated in Nesselrode v. Executive Beechcraft, Inc., 707 SW 2nd 371, at 376 to 78, 1986 case that the consumer expectations test is not the law of Missouri. Therefore, the Defendant's proposed instruction A is improper and our verdict directing instruction is proper under that case.

THE COURT: Okay. First of all, the Court has refused the Defendant's offered instruction A for the reasons just given by Mr. Kimbrell. The Missouri Supreme Court in the Nesselrode case recognized that Missouri did not and has not adopted the consumer expectations test in product liability cases. And that instruction, I believe, encompasses that standard, and therefore, I'm refusing to give the instruction.

The Defendant's offered instruction B relating to the withdrawal of Mr. Kelly's testimony is not being given for the reasons